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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

(S2) 15-cr-379 (PKC)

5 JUAN ANTONIO HERNANDEZ ALVARADO,

6 Defendant.

Oral Argument

7 -----x

8 New York, N.Y.

9 June 27, 2019

2:15 p.m.

10 Before:

11 HON. P. KEVIN CASTEL

12 District Judge

13 APPEARANCES

14 GEOFFREY S. BERMAN

15 United States Attorney for the
16 Southern District of New York

17 BY: EMIL J. BOVE III, ESQ.

18 MATTHEW J. LAROCHE, ESQ.

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Assistant United States Attorneys

19 THE MALONE LAW FIRM, P.A.

Attorneys for Defendant

20 BY: OMAR MALONE, ESQ.

-and-

21 LEWIS TEIN, P.L.

Attorneys for Defendant

22 BY: MICHAEL R. TEIN, ESQ.

23 Also Present: Erika de los Rios

Francisco Olivera

24 Humberto Garcia

Spanish Interpreters

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(Case called)

THE CLERK: For the government?

MR. BOVE: Good afternoon, your Honor. Emil Bove, Matt Laroche, and Jason Richman for the government.

THE COURT: Good afternoon to you all.

And for the defendant.

MR. MALONE: Good afternoon, Judge. Omar Malone and Michael Tein on behalf of Juan Antonio Hernandez Alvarado.

THE COURT: All right. Good to see you, Mr. Tein, Mr. Malone, and Mr. Hernandez.

So why don't we get right into things and begin with the declaration of Mr. Bove and the defendant's request to have access to that declaration.

MR. MALONE: Yes, Judge. As the Court is aware, we had filed a motion for a bill of particulars, and we requested, very modestly, quite honestly, thanks to my co-counsel, because I usually ask for a whole lot more. And the particulars were very focused because of the wide scope of the conspiracy alleged in the indictment, as well as some of the vagueness, quite honestly, as relates to who Mr. Hernandez was alleged to have conspired with.

And so we filed our motion. The government, we learned, filed an ex parte sealed submission to the Court. There was no leave of court. And so we had no opportunity to at least address that issue before its submission and review by

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1 the Court.

2 And so we wanted to flag that issue for the Court.
3 Obviously if the Court is comfortable the way that was handled,
4 we would accede to the wishes of the Court. But as a practical
5 matter, leave of court is usually sought, thereby giving the
6 opponent an opportunity to at least be heard on the subject
7 matter.

8 THE COURT: Well, I have your papers, and you're
9 welcome to say anything else you want to say. So the fact that
10 it was submitted ex parte and sealed can be undone, obviously.

11 MR. MALONE: Sure.

12 THE COURT: And I certainly haven't ruled yet on the
13 bill of particulars matter. So therefore, if there is anything
14 you want to tell me, recognizing that you haven't seen the
15 content of the affidavit, why, that's perfectly fine.

16 I know. It's tough.

17 MR. MALONE: It's very difficult, Judge, to tell you
18 what I don't know. I can tell you what I do know, and that is
19 that we haven't had an opportunity to be heard on that subject
20 matter.

21 THE COURT: Well, you do now.

22 MR. MALONE: I can't tell you any more than what we've
23 put in our papers because of our position of, sort of a lack of
24 direct knowledge as to the content.

25 If the Court wants to go through the bill of

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1 particulars, I'm happy to do that.

2 THE COURT: Let me first go through the situation with
3 the affidavit. I'm not a big fan of ex parte applications
4 under seal in criminal cases, or in any case for that matter.
5 But I've carefully reviewed the Emil Bove declaration of May
6 28, 2019. And it explains, I'll tell you right now, that it is
7 nine pages in length, it has 29 numbered paragraphs to it, and
8 it is detailed in explaining the specific concerns that it has
9 with specific disclosures of one or more individuals, the
10 identity of one or more individuals, and the factual basis for
11 the government's concern as to premature disclosure. Is that a
12 fair summary, Mr. Bove?

13 MR. BOVE: Yes, your Honor.

14 THE COURT: All right. And based on that and the
15 provisions of Rule 16(d), I conclude that there is a basis for
16 deferring disclosure of certain information because it poses a
17 substantial risk to the safety of others and the integrity of
18 the forthcoming trial.

19 So the declaration will remain under seal.

20 Now you can turn to the bill of particulars issue.
21 And, again, I've been through your papers, but go right ahead.
22 What is it that you feel you do not have? You mentioned, for
23 example, that you want the name of co-conspirators, the direct
24 co-conspirators, the dates, locations, participations in any
25 meetings or conversations the government will contend furthered

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1 the conspiracy, description of how Mr. Hernandez used or
2 carried machine guns as charged in Count Two and Three,
3 including the type of gun, the dates, the locations, and the
4 relationship to the drug trafficking crime, the substance of
5 the allegedly false statements referred to in Count Four, other
6 than that he, quote, never accepted money from drug traffickers
7 and he never provided assistance to drug traffickers in any
8 way, and particulars of the, I guess, the certain metadata that
9 you're seeking as well.

10 Let me begin the discussion by flipping this onto the
11 government's shoulders --

12 MR. MALONE: OK.

13 THE COURT: I saw you jump right down when I said
14 that.

15 -- with regard to Count Four. Is not the defendant
16 entitled to know what false statements formed the basis of
17 Count Four? Why shouldn't I order you to disclose that?

18 MR. BOVE: They are entitled to that, Judge, and we
19 agreed to that disclosure. On May 23, 2019, we sent the
20 defense a letter confirming that the two statements, which are
21 also identified in to-wit clauses in Count Four, are the
22 statements that are the basis for the charges. I just said two
23 statements. It's statements that your Honor just summarized.

24 THE COURT: And those two statements are the entirety
25 of the basis for the charge.

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1 MR. BOVE: Yes, your Honor. We do expect to offer
2 evidence of additional statements made during that proffer in
3 support of that Count. But those are the two bases for the
4 charge, and we've confirmed that for defense counsel.

5 THE COURT: OK. So do we agree that that's taken care
6 of?

7 MR. MALONE: I agree, or I agreed until I heard that
8 last statement by Mr. Bove when he said, we do plan to offer
9 additional statements in support of. And I don't know what
10 those are.

11 THE COURT: But those statements cannot be the basis
12 of a conviction of your client on Count Four.

13 Do you agree, Mr. Bove?

14 MR. BOVE: Yes, Judge. I think that the other
15 statement that we're talking about may raise questions of
16 admissibility. As to bill of particulars and fair notice,
17 we've identified the two. We've also made clear that we're
18 going to offer evidence of other statements that were made by
19 the defendant during the proffer. Those statements have also
20 been identified in notes that have been disclosed to the
21 defense.

22 THE COURT: But the point is, I would say at trial,
23 these statements are coming in, in support of Count Four, but I
24 must tell you, ladies and gentlemen, that you may not find the
25 defendant guilty of the crime charged in Count Four if you

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1 should happen to find that these other statements were false,
2 that he is not charged with those being false statements.

3 Would you object to that, Mr. Bove?

4 MR. BOVE: No, your Honor.

5 THE COURT: OK. So I think we do have that.

6 MR. MALONE: I agree, Judge.

7 THE COURT: OK.

8 MR. MALONE: Judge, I think you went to the easy one
9 first probably?

10 THE COURT: Of course I did.

11 MR. MALONE: Judge, our whole goal is not to have the
12 government disclose its mental impressions and theories of
13 prosecution or anything like that. Our goal is to make sure
14 our client is in a position where we have sufficient
15 information that will allow us at trial and any post trial
16 motions if necessary to be able to plead jeopardy, in other
17 words, so we know, generally, you know, this is where
18 Mr. Hernandez Alvarado is alleged to have possessed a
19 submachine gun, this is with whom he's alleged to have
20 possessed it, as opposed to just all this coming out in a
21 vacuum and it's not described in the indictment. And it's not
22 provided for in the discovery in any particular fashion. So
23 any information that allows you us to protect the
24 constitutional rights of Mr. Hernandez Alvarado, we would like
25 those disclosures to the extent that the Court is comfortable,

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1 disclosures that allow us to do that.

2 THE COURT: Right. And I've outlined what it is that
3 you're asking. So you're not really asking -- this is not a
4 criticism, it's an observation -- not really asking for any
5 information; you're asking for the specific information that's
6 included in your motion.

7 MR. MALONE: That's exactly right, Judge. And I'll
8 sit down with that.

9 THE COURT: Yes, OK.

10 Anything the government wants to add to their written
11 submissions on the bill of particulars issue?

12 MR. BOVE: I think I'd just like to draw a little bit
13 of our theory of the case on the weapons counts for the benefit
14 of counsel, sort of to supplement the record.

15 THE COURT: Well, it's also for my benefit. So go
16 ahead.

17 MR. BOVE: Sorry, your Honor. I meant for the benefit
18 of counsel in terms of notice.

19 THE COURT: I didn't mean that in any negative way,
20 but I will stand to learn also. Go ahead.

21 MR. BOVE: The government's theory on the weapons
22 charges, Counts Two and Three, is that the defendant
23 repeatedly, throughout the course of the conspiracy, caused
24 lower-level drug traffickers, some that were directly
25 associated with him and some more directly associated with his

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1 conspirators, who were also major drug traffickers, to provide
2 armed security for drug shipments that transited Honduras.
3 That happened on many, many occasions. I think the
4 government's theory will essentially be that it happened every
5 time hundreds of kilos of cocaine were shipped through the
6 country that were worth millions of dollars, that that was the
7 security that was provided and that the defendant caused, that
8 is, aided and abetted, drug traffickers who were armed to
9 protect those shipments.

10 Defendant also proposed weapons himself. Those are
11 referred to in the motion papers or photographs, some of them,
12 on their phone. I take counsel's point about the fact that the
13 defendant had licenses for some of those, and I think your
14 Honor had testimony about a little of that at the bail hearing.
15 The fact that the weapons were licensed is from our perspective
16 irrelevant. Our position would be that the defendant himself
17 possessed pistols and machine guns and destructive devices to
18 protect himself and the people around him, who were also
19 involved in the drug trafficking. As to the rest, Judge, I
20 think we've laid out the authority in our papers that this is a
21 motion that's routinely denied in this district. And the
22 reason, part of the reason that it's denied is that what
23 they're really asking for is almost entirely, is entirely,
24 derived from witnesses. And so to provide this information
25 would be to prematurely disclose the government's witnesses.

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1 THE COURT: Yes. The number of cases in this district
2 are many on denying bills of particulars. I've looked at the
3 indictment and specifically with regard to Count Two, and it
4 charges from at least in or about 2004 up to and including in
5 or about 2016, the defendant, during and in relation to the
6 drug trafficking crime for which he may be prosecuted,
7 specifically Count One, he knowingly used and carried firearms
8 in furtherance of such crime, knowingly possessed firearms, and
9 aided and abetted the use, carrying, and possession of
10 firearms, specifically machine guns. And then Count Three is a
11 conspiracy count, running from 2004 to 2016. And in *Calavante*,
12 which was a Judge Pauley case, the court denied particulars of
13 the dates, times, and locations that each defendant possessed
14 firearms. The court denied particulars of the dates and places
15 of possession and types of firearms. And I'm not going to
16 order it here because the defendant is on notice and, for
17 double jeopardy purposes, knows that the government has charged
18 the possession of firearms in connection with the drug
19 trafficking conspiracy in Count One, knows the "on or about"
20 dates, and that is all that's necessary.

21 With regard to co-conspirators, it's pretty well
22 established -- Judge Buchwald has held and others have held,
23 I've held -- that an indictment need not identify all alleged
24 co-conspirators, nor specify the nature, time, and place of
25 every overt act the defendant or others allegedly took in

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1 furtherance of the conspiracy. And that's true here. What the
2 defendant is now aware of is that the government has named
3 Victor Hugo Diaz Morales and Mario Jose Calix Hernandez as
4 defendants, and the government has already confirmed the
5 identity of one cooperating witnesses. And the government is
6 not required to do more than that at this time, particularly
7 where disclosure could undermine the integrity of the
8 proceeding and put cooperating witnesses in jeopardy and raise
9 a risk of witness tampering.

10 So having reviewed the entirety of the application for
11 a bill of particulars, in light of not only the case law but
12 the specificity of the indictment and also the disclosures that
13 were made in response to the bail application by the government
14 in laying out its case, I'm going to deny that motion.

15 Now let me hear about the circumstance with regard to
16 Mr. Laroche. And I gather what the defendants are asking is,
17 assuming Mr. Laroche is not going to be a witness, that any
18 documents regarding debriefing redact his name so it's not
19 before the jury that the advocate who stands before them is the
20 person who participated in the debriefing. What is the
21 government's position on this? I know you've said it's
22 premature, but what's the position on the merits here?

23 MR. BOVE: Judge, the position on the merits, I think,
24 is in line with the defense. It's just a little bit premature;
25 it's hard to predict right now frankly who's going to be on the

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1 trial team.

2 THE COURT: Right.

3 MR. BOVE: But either way, I think our intention would
4 be to propose that Mr. Laroche's name be redacted from the
5 proffer agreement and that Mr. Laroche not be referred to
6 during testimony on that meeting, and I think a fair substitute
7 would be a prosecutor from -- I'm not even sure that the
8 prosecutor would need to be identified as being from our
9 office. But we have an intention and a desire to keep
10 Mr. Laroche's name out of it for the reasons that the defense
11 has identified.

12 THE COURT: Let's see if you can get together with
13 Mr. Malone on that and come to an acceptable agreement, and if
14 you're not able to, I'll jump in.

15 MR. MALONE: I think we should be able to, Judge.

16 THE COURT: Good. All right.

17 Now, we have the motion to suppress. And as I
18 understand the motion, there are basically three grounds under
19 which the statements are sought to be suppressed. One is that,
20 under the Sixth Amendment, once Mr. Hernandez was charged, his
21 right to counsel attached and he was entitled to have a lawyer
22 unless he knowingly and intelligently waived that right. Then
23 there is the *Miranda* argument, the Fifth Amendment argument,
24 that he invoked that right and therefore questioning should
25 have stopped. And thirdly, there is the argument under the

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1 Second Circuit's case in, I think it's *Hammad*, that under the
2 disciplinary rules there's a no-contact rule that the statement
3 should be suppressed because the agents should not have
4 permitted questioning in the absence of Mr. Retureta. And I
5 think those are the three grounds. Am I right, Mr. Malone, or
6 Mr. Tein?

7 MR. TEIN: Tein. Thanks, your Honor. Those are three
8 grounds, but really we're proceeding on the third ground.

9 THE COURT: Which is the no contact?

10 MR. TEIN: Correct.

11 THE COURT: OK. I don't know what that means. So, in
12 other words, it's only necessary for me to reach the no-contact
13 and not the Fifth and Sixth Amendment ground.

14 MR. TEIN: It's a Fifth and Sixth Amendment analysis,
15 but it's all subsumed under no-contact. It's a different
16 analysis under your third point than under the first and second
17 point. You're correct, in a normal *Miranda* situation where the
18 defendant does not have counsel prior to the arrest known to
19 the government -- that's the usual *Miranda* situation -- the
20 defendant has to -- he can invoke -- and there's a question of
21 waiver and it has to be knowing and intelligent, and we know
22 there are cases where a defendant asks for a lawyer and then
23 subsequently decides he wants to talk to the police, and that's
24 a knowing and intelligent decision. We don't have to worry
25 about that. Actually this situation is far simpler than

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1 analyzing voluntariness or analyzing whether a defendant who
2 originally asked for counsel, then change his mind, without
3 some type of unconstitutional interference. Ours is much
4 simpler. Your third point.

5 THE COURT: But just before we get to that, I don't
6 know that it's simpler at all, because you're -- I'm not asking
7 you to withdraw your Fifth or Sixth Amendment claim. And
8 therefore they're on the table and they're live issues. So I
9 don't understand why you say it's simpler. I guess what you
10 mean by that is, grant me relief on any one of the three
11 grounds and then you don't have to reach the other two.

12 MR. TEIN: No. I'm actually being, I think, far
13 more -- far simpler and perhaps forthright.

14 THE COURT: Go ahead.

15 MR. TEIN: We're not throwing all the three strands of
16 the spaghetti against the refrigerator and see what sticks.
17 We're only throwing the third strand, that third point -- you
18 didn't make this point, but the way you framed the issue, that
19 the government -- I'm framing it -- the government knew the
20 defendant had counsel prior to arrest and they were prohibited
21 from -- the DOJ and the applicable state bar rules -- from
22 interviewing him absent a waiver from the lawyer. That issue
23 in and of itself is the only issue we're presenting as to
24 suppression. And it is both a Fifth and Sixth Amendment issue.
25 And I can explain why. But we are not saying, oh, he invoked

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1 *Miranda*, he waived *Miranda*, nothing like that. We're saying
2 that *Miranda* is not the issue that Court needs to look at. The
3 only issue -- this is why I think it's actually simpler than if
4 we were having a hearing on voluntariness -- is that if the
5 defendant indeed had counsel prior to the arrest and if the
6 government, the AUSAs or the agents, knew that he had counsel,
7 then the no-contact rules that we've cited prohibit him from
8 being substantively interviewed -- you know, beyond
9 fingerprinting and biographical -- prohibited him from being
10 substantively interviewed absent a waiver from only one person,
11 and it's not him, his lawyer. And that's what the no-contact
12 rule says. So that's the issue, the only issue, we think, that
13 the Court needs to decide.

14 THE COURT: And in deciding that issue, I have the
15 memoranda which describe the words said by the agents and the
16 words by Mr. Hernandez. What else do I need?

17 MR. TEIN: So the only thing that's missing is
18 whether -- is the -- so the government disputes whether
19 Mr. Retureta actually represented the defendant at the time of
20 the arrest. We don't think that's a plausible issue. The
21 issue is if the prosecutors instructed the agents not to
22 interview him and they went ahead and did it anyway, that would
23 be a violation of the disciplinary rule and the DOJ rule.

24 THE COURT: Well, it would be a violation perhaps of
25 the DOJ rule, but if we're talking about nonlawyer

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1 investigators, the no-contact rule doesn't apply to them, it
2 applies to lawyers, and if lawyers say don't do it and they do
3 it, it doesn't apply to the agents, I mean, listen, in terms of
4 the application of the disciplinary rule. That's the way it
5 is.

6 MR. TEIN: You're correct, in a way. Our object here
7 is not to get someone in trouble. I want to make that very
8 clear. We're not interested in pointing our fingers at these
9 AUSAs or at the agents. We have zero interest in that. In
10 fact, our papers have assumed that the AUSAs who were involved,
11 who are very seasoned and experienced, instructed the agents,
12 hey, you can't talk to this defendant who's just been arrested
13 without Mr. Retureta's approval. And it appears that that
14 theory, that indeed the AUSAs fully discharged their ethical
15 duties -- and I want to make this clear because I want to make
16 sure that the government, the prosecutors, know this, because
17 I'm not sure --

18 THE COURT: I'm more concerned that I know. You can
19 write them a letter afterwards and tell them your deep
20 affection and love later on.

21 MR. TEIN: I will.

22 The point is, I'm just assuming, and from the timing
23 of the phone calls, it appears that they did just that, that
24 they knew, as virtually everybody in the DOJ knows, when you
25 arrest a defendant who you've already dealt with his lawyer, no

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1 talking to him, no interviewing him, no interrogation, unless
2 you call in his lawyer first and his lawyer says OK. That's
3 why they made these three calls, the agents did, to Retureta.
4 Despite that -- this is the part we can't understand -- they
5 went ahead and interviewed him, and nothing else change during
6 that time except the agents turned to him again and asked him
7 after the third call, are you represented by counsel now, which
8 turned out to be the identical question they asked him 20
9 minutes earlier that triggered the calls, although the agents
10 didn't have to ask that because they knew he was represented by
11 Ms. Retureta, as did the AUSAs. And so that may be the point
12 that's missing. If indeed the AUSAs, as we think did happen --
13 I'm guessing but I'm fully giving them the benefit of the
14 doubt -- if indeed the AUSAs gave this instruction to the
15 agents and the agents didn't follow it, the statement has to be
16 suppressed, because, under the disciplinary rule and the DOJ
17 rules, very clear that the agents are arms of the AUSAs.

18 THE COURT: All right. We're going to talk more about
19 this. I'm not at this moment ready to rule. But I first want
20 to get down what my record is here. And so I have the text of
21 the exchanges or the description of the exchanges that are set
22 forth either in the video or in the memoranda prepared by the
23 agents, Papadopoulos and Gonzalez, of their conversations. So
24 I have that. And then you would ask me to assume for the
25 purposes of this motion that the assistants had told them not

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1 to speak to Hernandez if he was represented by counsel. Is
2 that correct?

3 MR. TEIN: I'm not asking you to assume that,
4 because -- I really would -- it would be much easier if we
5 could just know the truth. Either they did instruct them or
6 they didn't. If they didn't, it's very easy, it's over. If
7 they did instruct them and the agents disobeyed the
8 instruction, there must be a reason.

9 THE COURT: All right. Well, let me in the first
10 instance -- not in the first instance, we're well beyond the
11 first instance -- in the second instance, let me hear from the
12 government on this point. At this stage of the game, I'm
13 trying to figure out what my record is and what record I need
14 in order to fairly decide this issue. So that's the purpose of
15 my inquiry at this stage of the game.

16 MR. BOVE: Your Honor, the government's position is
17 that the motion can be resolved and should be denied based on
18 the record that is in front of you, and that record right now
19 consists of, as you said, the defendant's translation of the
20 recorded version of the post-arrest statement, that's attached
21 to their opening motion; Exhibit A to my publicly filed
22 declaration, which is the report that sets forth Special Agent
23 Gonzalez's handling of the prerecorded part of the meeting;
24 Exhibit B to my publicly filed declaration, which is the phone
25 records; and then there are e-mails also attached to that

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1 declaration from Mr. Retureta, one to Special Agent Gonzalez on
2 the day after the interview praising his professionalism and
3 one later in the day that we think speaks for itself and
4 indicates that Mr. Retureta was concerned about the fact that
5 he wasn't retained and that new lawyers were going to come in
6 to try to get this representation.

7 There is one other aspect of the record that I want to
8 speak to that is before the Court but I just want to make this
9 clear. In the defendant's reply, there was a reference to the
10 fact that Mr. Retureta, when he appeared in the Southern
11 District of Florida for the Rule 5 presentment on the Monday
12 after the arrest, entered a temporary notice of appearance. We
13 think that's very significant and probative of the fact that
14 there was not a representational relationship. The 5(c)(3)
15 documents are part of the record.

16 THE COURT: This is something that happened after the
17 fact.

18 MR. BOVE: It is, Judge, but we think --

19 THE COURT: I'm just trying to get the facts down.

20 So, in other words, how many days later was it?

21 MR. BOVE: It was the Monday after, which I believe
22 was the 20th.

23 THE COURT: Let me get back to something here. I
24 understand maybe the arguments; if the assumption is that the
25 assistants -- well, I don't know what the assistants said. I

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1 guess what -- Mr. "TEEN," is it? How do you --

2 MR. TEIN: Yes, your Honor.

3 THE COURT: What Mr. Tein says is really twofold, that
4 the assistant United States attorneys had actual knowledge and
5 are of the position that Mr. Retureta did in fact at that
6 moment in time represent Mr. Hernandez -- that's one -- and,
7 number two, because they had actual knowledge of this, told the
8 agents not to speak to him. Is that what you're asking me to
9 assume, Mr. Tein?

10 MR. TEIN: Yes, your Honor.

11 THE COURT: That of course has implications for the
12 Sixth Amendment claim as well, I suppose. So can you represent
13 that the lawyers for the government had actual knowledge that,
14 at the time of this interview, Mr. Hernandez was in fact
15 represented by Retureta?

16 MR. BOVE: No, your Honor. Mr. Laroche and I, the
17 lawyers in questions -- we're officers of this Court -- I think
18 we've been clear in motion papers and I'll be clear now on the
19 record, that we did not have actual knowledge. And I can go
20 further in terms of the strategy and approach to this interview
21 if the Court would like.

22 THE COURT: Sure.

23 MR. BOVE: Going into this we're sensitive to the
24 issues that are raised by counsel, the no-contacts rule, the
25 rule of the Sixth Amendment here, and *Miranda* as well. So

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1 there were discussions prior to the arrest operation about how
2 to handle that. Those discussions were based on the fact that
3 we had not heard from Mr. Retureta for 18 months. The last
4 time we had heard from him was this call that's referenced in
5 the motion papers that was May 2017. There's a subsequent
6 interaction that Mr. Retureta points to with Special Agent
7 Fragga in October 2017. For purposes of our knowledge, the
8 first time we heard about that was in the defendant's motion
9 papers. We had no information about that. We had not heard
10 from Mr. Retureta for 18 months. That was our state of mind
11 going into the arrest. And I think there is some other
12 evidence that corroborates that we were right about this. But
13 our state of mind before the arrest was --

14 THE COURT: You knew that there was a point in time,
15 18 months ago, where Mr. Hernandez was in fact represented by
16 Retureta.

17 MR. BOVE: I wouldn't go that far, your Honor. We
18 knew that Mr. Retureta had called the U.S. Attorney's Office to
19 ask about the status of the investigation. Attorneys do that
20 frequently, in order --

21 THE COURT: Yes, but you don't take the call. You
22 hang up the phone unless you believe that the person is
23 authorized to communicate --

24 MR. BOVE: Well, I don't think we did much more than
25 that, your Honor. We don't have a perfect recollection of this

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1 call.

2 THE COURT: Right.

3 MR. BOVE: But no information was provided to
4 Mr. Retureta. And the recording bears out that Mr. Retureta
5 made that call -- this is from the defendant's mouth on tape.
6 He never called the defendant to tell him what was said. So
7 our state of mind with respect to this call was: an attorney,
8 who had represented the defendant at proffer 25 months before
9 the arrest --

10 THE COURT: So let's take that. I'm just trying to
11 figure out what my factual record is. And then after I know
12 what my factual record is, then I want to hear from everybody
13 about what my factual record means. So I'm not trying to
14 mousetrap anybody here. I'm trying to get the facts down.

15 So 25 months ago, lawyers for the government knew, 25
16 months before this interview, knew, had actual knowledge, that
17 Retureta represented Hernandez, as of that moment in time.

18 MR. BOVE: Right.

19 THE COURT: And then 17 to 18 months before the
20 interview, there was a call from Retureta inquiring about
21 what's going on. The call related to Mr. Hernandez. He wasn't
22 calling about one of his other clients. He was calling about
23 Mr. Hernandez.

24 MR. BOVE: Yes.

25 THE COURT: And then there was no instruction to the

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1 agents by the assistant United States attorneys, do not talk to
2 Hernandez because he is represented by Retureta. You did not
3 so instruct them because you believed that no such instruction
4 was necessary.

5 MR. BOVE: That's correct. And we went a little bit
6 further than that, because we were sensitive to this. We said,
7 we don't think he's represented by, now, by Mr. Retureta, but
8 we understood that this day could come to pass. So what we
9 directed Special Agent Gonzalez to do was to put the question
10 to defendant: are you represented. And that's borne out in the
11 report. And that's your record on that.

12 THE COURT: I'm not -- I've said this, I'll say it
13 again -- I'm not up to deciding this issue, but, Mr. Tein, is
14 that the record that I should go on and you should base your
15 arguments on as to why this should be suppressed?

16 MR. TEIN: I don't know. I have to think for a minute
17 of the consequences of that.

18 THE COURT: Yes.

19 MR. TEIN: I'd like to know exactly what was said, and
20 I'd like to know why, after Mr. Hernandez said, I want to speak
21 to Retureta and they called Retureta three times, they didn't
22 leave a voicemail, didn't e-mail him, didn't call his office,
23 you know, his office in D.C., even though they had those
24 numbers, and then, from what we can tell from the DEA-6 and the
25 phone records, less than 40 minutes later, the agents started

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1 interviewing him substantively. There was a phone call at
2 12:18 p.m. on the day of arrest that was three minutes. We
3 don't know, now that I hear this, which is different from what
4 we had thought might have happened -- we assumed they had
5 instructed them, Don't -- but now that we hear this, there's a
6 question as to at what point did the AUSAs, or did they ever,
7 give the green light to the agents to go ahead and do the
8 interview, knowing that, really, Mr. Retureta, the lawyer,
9 didn't have that much time, certainly didn't have a reasonable
10 time, certainly 40 minutes after the call goes to voicemail
11 three times, immediately to voicemail, meaning his phone is
12 off. Why didn't they do all these other things? Why didn't
13 they give him a little bit more time? And then we find out
14 that --

15 THE COURT: We're getting now, no, seriously, we're
16 getting now into the arguments on the merits. You're going to
17 have a chance to argue the merits, as is the government. But
18 right now I want to know whether I have a record on which I can
19 rule. I think you've raised a point that I think I'd like to
20 hear from the government on, which is, did the assistant United
21 States attorneys evaluate what was said by Mr. Hernandez and
22 what was said by the agents and make a call on whether or not
23 the agents should proceed after learning of three phone calls
24 to Mr. Retureta?

25 MR. BOVE: Yes, your Honor, we did. And what happened

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1 was, continuing to be sensitive to this, we had told Special
2 Agent Gonzalez to get a sense of what the defendant had said.
3 And this is borne out in the report that's Exhibit A. And what
4 was relayed to us, in substance, was that the defendant had
5 been ambiguous about whether or not he was represented. And so
6 you can see this in paragraph 6 of the report. Special Agent
7 Gonzalez gets off the phone with us, and he says to the
8 defendant, that's it, we're done here, you haven't answered the
9 question.

10 Let me come back, because I don't want to put the
11 words in his mouth.

12 He gets off the phone with us, and he says to the
13 defendant, you're going to be lodged, we're not going forward
14 with an interview. And then the defendant reinitiates.

15 THE COURT: Now we're getting a little bit into the
16 argument. But I've got the point. So if I have it, what
17 you're telling me, or I think you're telling me but you'll have
18 to say more explicitly, that you, in words or substance,
19 advised the agents not to proceed at that moment in time based
20 on what you learned from them about the three calls.

21 MR. BOVE: At that specific moment, yes, Judge.

22 THE COURT: That's what I'm trying to get. I'm not
23 trying to mousetrap anybody.

24 MR. BOVE: No.

25 THE COURT: But that is important for me to know in

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1 terms of what the record is. And then you've been very clear.
2 And then something happened immediately after that.

3 MR. BOVE: Which led -- I just want to be clear that
4 at no point to the DEA do anything contrary to what we advised.

5 THE COURT: I understand.

6 Now, Mr. Laroche, you've heard a number of statements
7 made this afternoon by Mr. Bove. Can you either supplement,
8 correct, or confirm those statements?

9 MR. LAROCHE: I can confirm them, your Honor.

10 THE COURT: All right. Thank you.

11 And if there is any further representation made which
12 is not in conformity with your recollection, I call upon you to
13 rise and tell me so.

14 MR. LAROCHE: Understood, your Honor.

15 Just to be clear from me, I did not know that he was
16 represented by Mr. Retureta, and we would not have proceeded
17 the way we did if we thought that was the case, understanding,
18 as Mr. Bove said, this specific no-contact issue.

19 THE COURT: All right. What's more important at this
20 stage is the representations as to what the facts are and the
21 moments in which there were either red lights or yellow lights
22 given to the agents or green lights given to the agents. And
23 what I am hearing is that whatever it was, 23 months before the
24 interview, there was knowledge on the part of the government
25 that Mr. Hernandez was actually represented by Mr. Retureta,

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1 and then 18 months before there was a phone call from
2 Mr. Retureta relative to Mr. Hernandez, not calling about other
3 matters or other clients but about Mr. Hernandez implicitly.
4 And there was a conversation with the agents in which the
5 agents were told that they may not interview Mr. Hernandez if
6 he is represented by Mr. Retureta and that there was a
7 conversation thereafter in which the agents recounted what had
8 transpired with regard to the three phone calls to the phone
9 number of Mr. Retureta, and at that point the assistant United
10 States attorneys said, do not proceed at this juncture. Have I
11 accurately summarized the facts? I'm not talking about the
12 consequences or what anybody thinks should happen on those
13 facts, but are those the facts?

14 MR. BOVE: With a slight change, your Honor. The
15 point we're up to is a consultation after, it was actually
16 before, the first two calls from Mr. Retureta, where, as a
17 courtesy, we said that's fine, if we want to try and place
18 those calls, but we think it makes sense to stop here. And
19 then we would rely on paragraph 6 of Exhibit A for the rest of
20 these facts. But what happened is, that statement was made.

21 THE COURT: All right. Are those the facts, Mr. Tein,
22 that you want to base your argument on and I can proceed to
23 hear this?

24 MR. TEIN: Yes, but I just have one question.

25 THE COURT: Sure.

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1 MR. TEIN: We did a little chart on the front page of
2 our reply brief, based on the information that the government
3 had provided, very forthrightly, in their response to our
4 motion. And the thing that I'm not -- I just want to make sure
5 we're all on the same page, because it is a little confusing --
6 is that my understanding is that, after the third phone call by
7 the agent to Mr. Retureta's cell immediately going to
8 voicemail, that the agent had then asked him again, asked
9 Mr. Hernandez again, the same question that he had asked at the
10 beginning, about 40 minutes earlier: do you have a lawyer? And
11 he said, I don't know. At that point, there was a phone call
12 of three minutes, 12:18. And I just want to understand from
13 the AUSAs, if your Honor will ask them, is that the phone call
14 in which the AUSAs told the agent, no, do not interview him,
15 the final time? And I just want to understand, was there any
16 time -- I'm trying to understand the main -- I believe one of
17 the AUSAs said that the DEA agents at all times followed their
18 instructions. And so if that's the case, at what point did the
19 AUSAs' instructions change? That's the only part I'm confused
20 about.

21 THE COURT: Yes. I understand your question. I think
22 I understand your question. So the narrative I've heard so far
23 was, to use the colloquial, a red light, and then there was the
24 statement made by Gonzalez to Hernandez that, quote, he was
25 going to be processed and taken to jail without an interview,

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1 close quote. And Hernandez stated, quote, that he wanted to
2 speak with agents at this moment and start cooperating. And
3 that's the point at which Gonzalez called Retureta a third time
4 with no answer.

5 And what I think Mr. Tein is asking is, was there a
6 conversation in which the assistant United States attorney
7 turned the red light to a green light, or did the agents
8 operate based on their own judgment call as to what
9 Mr. Hernandez's statement to them meant. Is that the question?

10 MR. TEIN: Yes, your Honor.

11 THE COURT: OK.

12 MR. BOVE: To use those terms, Judge, we change the
13 red light to a green light based on the defendant having said,
14 I want to speak to you and do not know whether I have a lawyer.
15 Special Agent Gonzalez contacted us. Those statements were
16 relayed to us. And we said, proceed to the interview.

17 THE COURT: All right. That's what Mr. Tein wanted to
18 know. That's what I wanted to know.

19 MR. TEIN: There is still just one question about
20 timing, though. According to the DEA-6 and the phone calls,
21 I'm unclear as to when that green light happened, because --
22 and it's important. After the third call to Retureta at 11:54,
23 according to the DEA-6, the agent again asked him, do you have
24 a lawyer, and he said, according to the DEA-6, that he did not
25 know, quote/unquote.

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1 THE COURT: And as I read that, that was after the
2 call to Retureta a third time with no answer.

3 MR. TEIN: Right.

4 THE COURT: And your question is, at what point in
5 this chronology was the red light turned to a green light? Is
6 that the question?

7 MR. TEIN: Right. Because according to the DEA-6 and
8 the phone records, it appears that the very next thing that
9 happened was a phone call of three minutes, beginning at 12:18,
10 when the agents called the AUSAs. We don't know what was said
11 on that call. It doesn't mention anything in the government's
12 response or in the DEA-6. Presumably they said, OK, Retureta
13 has not answered, the defendant said he did not know. But
14 there's nothing in the DEA-6, prior to that phone call,
15 indicating that it was at that point that the defendant said, I
16 want to speak to you. In fact, it appears the opposite is
17 true, that it was sometime around 12:20, 12:21, when the agents
18 began fingerprinting him, sometime between the phone call and
19 that last thing, where the defendant, according to the agents,
20 said, I want to speak to you. So I just want to know whether,
21 is that 12:18 call, which would have been the third call
22 between the agents and the AUSAs that morning to early
23 afternoon, was that the call in which the agents told the
24 AUSAs, oh, now he said he wants to speak to us and the AUSAs
25 said go ahead? And secondly, if that happened, what if any

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1 precautions did the AUSAs instruct the agents to take about not
2 eliciting privilege?

3 MR. BOVE: I'm still trying to confine myself to these
4 questions of what is the record, Judge.

5 THE COURT: Yes. That's really what I'm going for.
6 And then I'm going to give both sides an opportunity to argue
7 what the record is, once I'm satisfied that we have a record
8 here.

9 Go ahead.

10 MR. BOVE: So the record, I think, on these issues
11 right now, is Exhibits A and B to my declaration. Exhibit A
12 reflects that the defendant twice indicated in substance that
13 he wanted to proceed with an interview. The first time is in
14 paragraph 6. And then the second time is in paragraph 7.

15 With respect to the question of when the so-called
16 green light was given, I don't have a specific recollection of
17 whether that was -- and frankly I don't have a recollection of
18 which of these -- I don't have a recollection of which of these
19 calls it was, whether it was -- you can see on Exhibit B
20 there's an 11:50 call to Mr. Laroche's number that lasts two
21 minutes. Then there's the third Mr. Retureta call, 11:54.
22 Then's a 12:18 call with Mr. Laroche.

23 The only point I want to make about the record on this
24 is, the next thing, the next relevant time stamp is paragraph 8
25 of the DEA report, which says that at approximately 12:20, the

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1 agents transferred the defendant from the CBP space at the
2 airport to the DEA space to actually do the substantive
3 interview. So in terms of the record, prior to that happening,
4 I'm comfortable saying and confident that we had authorized the
5 DEA to put a *Miranda* waiver to the defendant.

6 THE COURT: And what time was that?

7 MR. BOVE: Before 12:20.

8 THE COURT: Before 12:18 or --

9 MR. BOVE: I'm saying before the agents left the CBP
10 space to go --

11 THE COURT: C --

12 MR. BOVE: Sorry, Customs and Border Protection. They
13 basically took the defendant from another agency's office to
14 their office to do this interview. Prior to that happening, we
15 authorized them to take that step. I can't, I just don't
16 remember, whether it was -- which of these calls it was.

17 THE COURT: And that was before the video interview.

18 MR. BOVE: Yes, Judge.

19 There was another question about, did we give the
20 agents any instructions.

21 THE COURT: Right, about privilege.

22 MR. BOVE: We gave the agents no instructions
23 regarding privilege and no instructions about how to focus or
24 handle the interview. We left that to them.

25 MR. TEIN: There is just one question. And I hear

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1 from AUSA Bove that he may not remember correctly and it might
2 refresh his recollection. If the DEA-6 is correct, it has a
3 slightly different chronology. According to paragraph 6 of --
4 and I'm not casting any doubt on the AUSA's credibility. I
5 understand this is confusing and everything happened quickly
6 and there were three phone calls. I get that. But according
7 to the agent who did this report, it says that, on paragraph 6,
8 at this time -- is your Honor at DEA-6?

9 THE COURT: I'm at paragraph 6.

10 MR. TEIN: "At this time, Agent Gonzalez'" -- "A/GS"
11 means "group sup.," I think -- "group supervisor Gonzalez
12 contacted the AUSAs, who gave permission for Gonzalez to place
13 a phone call to Retureta." That was the first phone call, I
14 think, which was at 11:25. That was the first time that they
15 were speaking. And that was 11:25 with the AUSAs. 11:36 was
16 the first call to Retureta. And he says, the agent does, "We
17 called two times with no answer." That would be the 11:36 and
18 the 11:38 call.

19 Then, at 11:40, the agents called the AUSAs, but it
20 appears to be a two-minute call, so probably it's a call that
21 went to voicemail. And then at 11, we know that at 11:50, the
22 AUSAs called the agents back. And I think that's a two- or
23 three-minute call. But regardless, it was at that point, after
24 the two times no answer, it says, "After additional
25 consultation with Bove and Laroche," so that would have been

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1 the 11:50 call, "Gonzalez informed Hernandez that he was going
2 to be processed and taken to jail without an interview.
3 Hernandez stated that he wanted to speak with the agents at
4 this moment and start cooperating." So Gonzalez called
5 Mr. Retureta again, with no answer. That's the 11:54 call.
6 Gonzalez then asks him, do you presently have legal
7 representation? And he says, I don't know. At that point he
8 provides him with his consular rights and says that if he had
9 an attorney -- then it goes into paragraph 7.

10 So it appears that all of that occurred prior to the
11 12:18 call with the AUSAs. I just, I don't know if that was
12 the same chronology, but it appeared to be different to me.

13 THE COURT: So your question, if I get it, is, having
14 reviewed paragraphs 6 and 7 of the report of investigation,
15 does that refresh your recollection that the chronology is
16 different from that which you represented and is in line with
17 Mr. Tein's recitation?

18 MR. BOVE: No, Judge. I think the documents speak for
19 themselves. I think at this point the record is closed. We
20 don't have anything to supplement it with. I've described my
21 recollection. You've given Mr. Laroche an instruction to
22 correct me where his recollection differs. And to my mind,
23 what I've just heard was consistent with what I said. And what
24 I understand to be going on is some urging by Mr. Tein for me
25 to say that it was the 12:18 call that was the green light.

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1 And I'm being honest with the Court that I don't recall
2 specifically what was said at 12:18. My recollection is that
3 we authorized this before they transferred him to the office.
4 And that's why I was careful about saying that the so-called
5 green light was given before 12:20.

6 THE COURT: All right. Mr. Tein, I think we have a
7 record here. Yes?

8 MR. TEIN: Yes, your Honor. We agree.

9 THE COURT: And Mr. Laroche, do you agree we have a
10 record here? Or not Mr. Laroche, Mr. Bove?

11 MR. LAROCHE: Yes, Judge.

12 THE COURT: Mr. Bove, you agree?

13 MR. BOVE: Yes, your Honor.

14 THE COURT: All right. So let me hear Mr. Tein's
15 argument based on what I now believe to be the facts. I
16 consider the record closed and will now be delighted to hear
17 your argument. Yes.

18 MR. TEIN: May it please the Court, as I said in the
19 beginning, and I think this is important, and it's important
20 for everyone to know, we're not here casting aspersions on
21 anyone. If there was a violation of the no-contact rule, it
22 may well have been done in good faith. It appears from what
23 these AUSAs have both said that everything they did was in good
24 faith. But that's really of no moment one way or the other.
25 We're not here to pass judgment on their intention. If in fact

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1 there was a violation of the no-contact rule, then the
2 statement should be suppressed.

3 And here are the questions that I have that I think,
4 by way of argument, that I think are relevant. What was the
5 rush? And why didn't they make what appears to be a more --
6 why didn't they make a more concerted effort? If they really
7 didn't believe that Retureta represented Mr. Hernandez, first
8 of all, why call him at all? But I hear, in an abundance of
9 caution, they called.

10 And then we know they called twice. The phone
11 immediately went to voicemail. At that point, if the purpose
12 of the call is to check, is to actually get Mr. Retureta on the
13 phone, they had his office line in Washington, D.C. There was
14 a secretary there. He has a law partner at that office. They
15 have voicemail there. No voicemail was left.

16 They have his e-mail. When a cellphone goes
17 immediately to voicemail, it generally means it's off for some
18 reason. The gentleman might have been in court. If their
19 intention was to call Retureta and see, indeed, hey,
20 Mr. Retureta, do you still represent him? Because there could
21 be no other purpose for the call, other than to check that and
22 ask whether he would give permission for the interview. Given
23 that they call and it went right to voicemail, and they called
24 again and it went right to voicemail, the record is clear that,
25 within 40 minutes of their third phone call going to Retureta's

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1 voicemail immediately, they began the interview.

2 So there is an inconsistency with the position that he
3 was not represented by counsel and making these phone calls.
4 I'm not saying that they should be -- that the statement should
5 be suppressed because the AUSAs were being extra careful. I'm
6 saying that the fact is that Mr. Retureta did represent him,
7 that they then have a face-to-face meeting in Miami, an
8 extraordinary meeting where Mr. Hernandez, the defendant,
9 traveled from outside of the country to the United States and
10 sat down with one of the prosecutors and two of the agents,
11 including the special agent in charge, who was at this
12 interview, and that this defense lawyer, Mr. Manuel Retureta,
13 is well known to the office. They knew how to get him. And
14 there is no doubt, it's on the record, that Mr. Retureta called
15 one of the AUSAs about a year and a half before to check on
16 this.

17 What's also clear is that the day after this all
18 happened, there were e-mails back and forth between the U.S.
19 Attorney's Office, one of these prosecutors, and Mr. Retureta
20 in which the AUSA sent, by e-mail, to Mr. Retureta, the
21 indictment, which was then under seal and could not have been
22 sent to that person if the AUSA didn't have a good-faith belief
23 that this man, Retureta, represented this man, Mr. Hernandez.
24 They clearly -- these AUSAs are seasoned. They know Rule 6,
25 Federal Rule of Criminal Procedure 6. They would not have done

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1 that unless he did.

2 So their argument was, well, there was a hiatus.
3 Retureta didn't believe there was a hiatus, because as soon as
4 he found out that they had called, which turns out to be not
5 from his voice mails because they didn't leave any, but because
6 a relative of Mr. Hernandez found out through the other person,
7 I guess, who was arrested, that he had been arrested, Retureta
8 immediately e-mails, texts to the agents and to the AUSA. And
9 that starts within 50 minutes of the end of the interview, less
10 than an hour. The interview ended at 1:53. The agents, three
11 minutes later, called the AUSAs for 22 minutes, likely briefing
12 them on the interview. Mr. Retureta begins e-mailing the agent
13 and the AUSAs at 2:41. So clearly less than an hour. And
14 that's why it wasn't reasonable. If you really want to get
15 in -- it's the same thing that we do every day when -- we have
16 a rule in this court and in our Southern District of Florida.
17 It's the same in federal court all over the country. You have
18 to confer before filing a motion. And conferring doesn't mean
19 calling and not getting it and then hanging up, calling,
20 hanging up. It doesn't even mean leave a voicemail, in 40
21 minutes file the motion. It means a good-faith effort at a
22 conference. Most respectfully, despite what the intentions
23 were, that was not done here.

24 There was no urgency -- meaning there was no urgency;
25 the general was in custody, and there was no evanescent-

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1 evidence issue. There was no danger to the community that was
2 imminent or danger to the defendant or any other person. They
3 could have waited two hours. They could have waited three
4 hours. They could have waited a day. They had a whole weekend
5 to interview him before his initial appearance in Miami.

6 This entering of the temporary appearance is of no
7 moment. I'm sure it's the same in this district. At the
8 defendant's initial appearance, almost every single time, the
9 lawyer says, I'm entering a temporary appearance. It's done
10 all the time. The important thing is not whether he said his
11 appearance was temporary from there forward, but the point was,
12 up until that point, he was his lawyer. Whether he's going to
13 be his lawyer for the purpose of the next year and a half of
14 trial, that's different. But it was very clear, Hernandez was
15 represented by a lawyer for all the pretrial period.

16 The government says this was, quote, part of a naked
17 attempt to restart a lapsed representation, unquote, part of a
18 naked attempt to restart a lapsed representation. I think it's
19 very clear that that is not the case. I think that the, most
20 respectfully I submit to your Honor, that the only conclusion
21 that one can draw from these facts is that the no-contact
22 rule -- without any question of the AUSAs' good faith, but a
23 mistake -- was violated. They knew as an objective matter that
24 the man was represented. They had a subjective concern that he
25 was represented. They acted both before the interview and

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1 after the interview as if he were represented. But the agents
2 and the AUSAs really wanted to interview him, because his
3 brother is the president of Honduras, who is a target of their
4 investigation. And everyone couldn't really help themselves.
5 And if it turned out that they were able to flip him at that
6 moment, right after the arrest, when it is so raw and the
7 emotions run so high, and that period, the bell curve of when
8 you're likely to get a confession is right then, they were
9 hoping that would happen. And the agents were certainly hoping
10 that would happen.

11 Thank you.

12 THE COURT: Thank you.

13 Mr. Bove, I'll allow you to continue. Just give me a
14 moment, if you want to take a moment. I want to look at a
15 couple of things here.

16 (Pause)

17 THE COURT: All right. Mr. Bove.

18 MR. BOVE: Thank you, your Honor.

19 I think today it has been helpful so far to narrow the
20 issues presented by this motion. And it seems that the defense
21 has put aside and abandoned the Fifth and Sixth Amendment
22 arguments and is focused on this no-contacts rule. I want to
23 address and respond to some of the factual arguments that were
24 made. But before I do that, I think there are two very
25 straightforward bases at this point to deny this motion.

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1 The first is, the defense argument is that the
2 government violated the no-contact rule, which prohibits the
3 U.S. Attorney's Office from directing agents to interview
4 represented parties. In order to prevail on that motion, they
5 have to establish that the defendant was in fact represented,
6 and that we knew that. The state of the record on that
7 question right now is, two assistant United States attorneys
8 saying that they lacked that knowledge and statements reflected
9 in Special Agent Gonzalez's report by the defendant indicating
10 he does not know if he has representation, and then recorded
11 statements, in a document submitted by the defense, where the
12 defendant confirms what he had said to Special Agent Gonzalez
13 before the interview started, which is that he was not
14 represented at the time. And I think there's a glaring
15 omission in this record, and it's, I think, dispositive, that
16 even after we call out this issue in our opposition, there is
17 still no declaration from the defendant saying, yes, I was
18 represented at the time. And so on that basis, the defense has
19 not established that the no-contacts rule applied.

20 But for a second, let's assume that it did. There is
21 an independent basis for denying this motion. That is because,
22 since *Hammad* was decided in 1988 and there was a suppression
23 remedy discussed in that opinion, it's rarely if ever been
24 applied. And we cite an EDNY case from this year sort of
25 recounting the history of that. And certainly, in order to be

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1 entitled to a suppression, I believe what would be necessary --
2 and it's their burden -- is to establish bad faith by us. Not
3 by Special Agent Gonzalez. By us. And there is none of that
4 in the record. And to the contrary, defense counsel started by
5 saying, essentially, that they weren't arguing that there had
6 been bad faith. And because of that, even assuming that the
7 rule applied, this motion should be denied.

8 Now if I could, I'd like to get into some of the
9 factual assertions that counsel just made. One of the
10 questions presented was, what was the rush. First and
11 foremost, that is an irrelevant question, because from our
12 perspective, the interview was lawful and appropriate because
13 the defendant had said that he was not represented. But there
14 were valid law enforcement interests to interview this man at
15 the time, and the agents were entitled and we were entitled to
16 pursue that option, as long as we complied with our ethical
17 duties in the Constitution. And they included the fact that
18 the defendant was in a position to cooperate proactively before
19 his arrest could become public. He said that he wanted to do
20 that. And there's nothing untoward about the DEA taking
21 defendant up on that, when he's the one asserting -- and this
22 is, again, in the fixed record, in his report, in Special Agent
23 Gonzalez's report -- that that's how he wanted to proceed.

24 There was a series of questions at the beginning of
25 defense counsel's presentation. The next one was, essentially,

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1 why wasn't there more effort to get in touch with Mr. Retureta.
2 We instructed Special Agent Gonzalez to try and get in touch
3 with Mr. Retureta to honor the request that the defendant made,
4 which is reflected in paragraph 5 of the report, to try and
5 give him a call. That was a courtesy. It wasn't required. We
6 weren't required to get in touch with him. Some arguments have
7 been made about the phone number that Special Agent Gonzalez
8 used. That phone number, Judge, is the number that the
9 defendant had in his phone for Mr. Retureta. Nothing, nothing
10 was required. What was done was a courtesy, and to the extent
11 that's relevant at all, the calls to Mr. Retureta established
12 that there was no bad faith here and therefore no suppression
13 would be appropriate.

14 Another argument that's been made deals with
15 transmission of the indictment by the U.S. Attorney's Office to
16 Mr. Retureta on Saturday the 24th following the arrest. The
17 indictment was not sealed at that time, Judge. We are familiar
18 with Rule 6(e). There was an order entered by Judge Pitman
19 dated November 21st, 2018, so two days before the arrest, that
20 unsealed the indictment effective upon the defendant's arrest.
21 For whatever reason, Judge, and we're not sure what it is, that
22 order was not docketed, so if I could, I would hand a copy to
23 counsel and to the defendant.

24 THE COURT: If you would.

25 MR. BOVE: The e-mail to Mr. Retureta transmitting the

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1 indictment was a government employee sending a public document
2 to a lawyer who expressed interest on behalf of a defendant.
3 It certainly wasn't a concession on our part that Mr. Retureta
4 represented the defendant on a Saturday after the arrest. And
5 it was entirely consistent with our view that Mr. Retureta was
6 simply trying to develop business. He wanted to be retained
7 and he wanted to be involved in that case.

8 If Mr. Retureta had submitted a declaration in
9 connection with the defense reply, it really doesn't do much
10 more than authenticate the documents that the defense submitted
11 in connection with the opening motion papers. We've set out
12 those facts, they're in the record, about the contacts that we
13 had. And what Mr. Retureta failed to do is explain why it is
14 that on a Saturday after the arrest he e-mailed Special Agent
15 Gonzalez and thanked him for his professionalism. We've made
16 this point in our papers. It bears repeating. If the types of
17 ethical misconduct that have been alleged in these motion
18 papers had occurred, there is no way that that would have been
19 Mr. Retureta's reaction.

20 We think the fact that he wasn't retained as of -- he
21 wasn't representing the defendant as of November 23rd is
22 further supported by the fact that he e-mailed us later that
23 afternoon, around 4 p.m. -- and this is, I think, in Exhibit F.
24 The praise of Special Agent Gonzalez's professionalism is in
25 Exhibit E. The e-mail that I am now going to describe is

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1 Exhibit F to my declaration, where Mr. Retureta said, I'm going
2 to instruct the Bureau of Prisons not to allow any other
3 defense attorneys to attempt to visit the defendant.

4 When we received that e-mail -- maybe it went to
5 Mr. Laroche first and it was sent to me -- that was a pretty
6 extraordinary position, from our perspective, to have a defense
7 lawyer seeking to block other attorneys from meeting with the
8 defendant. And we think it's probative of the fact that he
9 knew there would be other attorneys interested in this
10 representation, he didn't represent the defendant, and he
11 wanted to take that up after he learned of the arrest.

12 Now, defense counsel just made some references to the
13 fact that this temporary notice of appearance that was filed
14 the Monday following the arrest in the Southern District of
15 Florida in connection with Rule 5(c)(3) proceedings there, and
16 I think defense counsel's representation was that that happens
17 all the time because that's how this is done.

18 THE COURT: So what do you do with the November 23,
19 2:53 p.m. e-mail from Mr. Retureta to Mr. Laroche, "Hello,
20 Matt, I understand Tony Hernandez has been arrested in Miami,
21 please note that I continue to represent him. Please make any
22 necessary inquiries through me, as he does not wish to speak
23 without defense counsel present. Is he detained in Miami, or
24 is he being transported to New York? Thank you. Manny."

25 MR. BOVE: What we made of that, Judge, was that

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1 Mr. Retureta was trying to insert himself as representing the
2 defendant. And keep in mind, what the defendant said on tape
3 was that, I haven't spoken to this man in over a year, the last
4 time I spoke to him --

5 THE COURT: What questioning of the defendant took
6 place after that e-mail on November 23rd?

7 MR. BOVE: None. The interview was complete. But
8 even -- so I think that's dispositive. But this was not to us
9 demonstrative that he had represented him at any point, and I
10 don't think it should be taken as evidence of that now.

11 Defense lawyers routinely contact us, after someone has been
12 arrested, to try and stop lawful post-arrest interviews, and
13 before counsel has been appointed or appeared on behalf of a
14 defendant and been able to establish that they do in fact have
15 that relationship, this does not, would not have set up a bar
16 to us proceeding with the interview.

17 Getting back to this temporary notice of appearance,
18 Mr. Retureta sent an e-mail to Mr. Laroche at about 4 o'clock
19 on Saturday, the afternoon of the arrest, where, again, he
20 says, "I'm going to take steps to bar other the attorneys."
21 And here's the quote, that he's trying to prevent, "Publicity
22 will bring out attorneys hoping to secure representation of
23 Tony." "Secure," present tense, as in, as of Saturday,
24 November 24th, at 4:38 p.m., Mr. Retureta still is not
25 comfortable that he represents the defendant.

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1 What happens on Monday is, he goes to court and he
2 appears on behalf of the defendant. He enters a temporary
3 notice of appearance. It's on our docket sheet, I think, at
4 docket entry 17. And so this is an appearance just for
5 purposes of the Rule 5(c)(3). That's probative of the fact
6 that defendant still had not retained Mr. Retureta for all
7 purposes.

8 And it is not the case that that always happens in the
9 Southern District of Florida. I participated in a Rule 5(c)(3)
10 presentment in October of last year in the Southern District of
11 Florida. It was docketed down there 18-mj-03581. The case is
12 now before Judge Rakoff at docket 18-cr-820. And in that case,
13 defense counsel, retained defense counsel, entered a notice of
14 appearance, for all purposes on behalf of that defendant.

15 So it's just not true that as a matter of course
16 attorneys enter these limited notices of appearance. And I
17 think the inference that the government is entitled to is that,
18 in that situation, Mr. Retureta entered that notice of
19 appearance consistent with the e-mail on Saturday afternoon
20 knowing that he hadn't been retained as of that time.

21 And why does this matter? All getting back to the
22 point of, at 10 a.m., on November 23rd, 2018, we do not believe
23 Mr. Retureta represented defendant; the defendant on tape said
24 he did not believe that Mr. Retureta represented him; and then
25 everything that happened after that supports the conclusion

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1 that we were right in our instincts.

2 That both goes to the no-contacts rule not applying at
3 all, but also the lack of a suppression remedy for the facts
4 here, because the entire record shows that we were reasonable
5 about this and acted in good faith the entire time.

6 I'm happy to address any other questions from the
7 Court, but I don't have anything else to add.

8 THE COURT: Thank you. One moment, please.

9 I'll give you a brief reply if you'd like.

10 MR. TEIN: Just two quick issues. Thank you, your
11 Honor.

12 I think it's very clear we didn't abandon our Fifth
13 and Sixth Amendment arguments. Those are embodied in the
14 no-contact rule. We briefed that very clearly in our brief.

15 The only other issue that needs to be addressed that
16 was not addressed in our brief is this newly produced order,
17 which is also of no moment, because if there really were an
18 issue in their mind of whether Mr. Hernandez was represented by
19 Retureta, your Honor just heard, they don't even want to
20 hear -- they do not even want us to have access to certain
21 evidence before trial because they have convinced -- because
22 they've taken the position, which has been accepted, that there
23 is all this danger in the case. And so the fact that
24 Mr. Laroche did transmit the indictment the very next day upon
25 request of Mr. Retureta is a significant fact, we believe.

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1 THE COURT: Thank you.

2 Mr. Hernandez has moved to suppress the November 23,
3 2018 post-arrest statements that were made. There is no
4 question that, in October 2016, Assistant United States
5 Attorney Matthew Laroche and DEA Agents Papadopoulos and Fragga
6 coordinated and conducted a proffer session with Mr. Hernandez
7 through his lawyer, Manuel Retureta.

8 In May of 2017, Retureta and Laroche communicated
9 about Hernandez, and in October 2017, Retureta communicated
10 with DEA Agent Fragga, but there is no basis to conclude that
11 either of the assistant United States attorneys were aware of
12 the October 2017 communication.

13 On November 20, 2018, Hernandez was indicted by a
14 grand jury, and on November 23 was arrested at Miami
15 International airport. After the arrest, Agents Papadopoulos
16 and Gonzalez brought him to an office in the airport, and there
17 was a question about, apparently, Hernandez stated that he
18 wanted to cooperate and that, quote, he told his lawyer over a
19 year ago that he wanted to cooperate, and he, the lawyer, told
20 Hernandez that he would speak with the prosecutors but never
21 notified Hernandez. Gonzalez asked if Hernandez presently had
22 a lawyer, to which Hernandez responded, he, quote, had not
23 spoken to Manny in over a year but would like to call him
24 first.

25 There were communications between the agents and the

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1 assistant United States attorneys in New York, and they
2 initially gave a red light, a stop, to any communications. At
3 some point in this chronology, Gonzalez called Retureta's
4 cellphone twice with no answer. And after the assistants
5 indicated to the agents that they should not proceed, Gonzalez
6 told Hernandez that he was going to be processed and taken to
7 jail without an interview and without being asked a question,
8 Hernandez stated, quote, that he wanted to speak with agents at
9 this moment and start cooperating. And Gonzalez asked
10 Hernandez, again, the Court assumes, with input from the
11 assistant United States attorneys, whether he presently had
12 legal representation, and Hernandez stated that he did not
13 know. Gonzalez informed Hernandez that if he had an attorney
14 and wanted to consult with this attorney prior to cooperating,
15 that he was entitled to that, and if he wanted to speak to
16 agents and begin cooperating, that he would be advised of his
17 rights and would need to agree to this voluntary participation
18 in a recorded interview.

19 It was then that Hernandez was taken from what sounds
20 like the Customs and Border Patrol area to a different office
21 in the airport, and a video interview took place. One of the
22 agents said, "I want to repeat here what you told me earlier,
23 that you wish to proceed and make a statement and talk with us.
24 You do not have legal representation today, now, huh? You will
25 be talking to a lawyer in the future, but you wish to start

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1 this process now." Hernandez responded, "That's right. I want
2 to start." And the agent said, "We called Mr. Retureta several
3 times but he did not answer, but do you still wish to go
4 ahead?" He said, "I do." Hernandez was then read his *Miranda*
5 rights and signed a written waiver of those rights. He
6 verbally, orally confirmed that he had not been pressured or
7 threatened and that the conversation was totally voluntary.

8 The agent, referring back to October 2016, said, "I
9 know you said earlier that you came to talk to us over a year
10 ago." Hernandez responded, "Yes, a year and a half or two ago,
11 I don't know, something like that." The agent said, "I believe
12 that you said something about your wishing to start this
13 cooperation process since some time ago." Hernandez said,
14 "Yes. What I was discussing with attorney Retureta was that I
15 was prepared to come over here in case you all wanted to
16 continue having some clarification or for me to continue
17 answering questions from all of you. And at that time, while
18 the lawyer told me, quote, let's wait, they will let us know,
19 and then time went by, I lost touch with the lawyer, and what
20 happened today happened." The agent inquired, "When was the
21 last time that you spoke with the lawyer?" Hernandez said, "I
22 think it was one year ago." The agent inquired, "One year
23 ago?" Hernandez said, "Yes," and something else that was
24 unintelligible. The agent then asked, "Then he is not your
25 lawyer today until you talk to him again?" And Hernandez

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1 responded, "Until I talk to him again. He is the one who was
2 handling the matter first." The agent said, "Aha." Hernandez
3 said, "But I have lost touch with him. Let's hope that he will
4 join the process." And the agent said, "As I told you, you can
5 add a lawyer to the process at any time." Hernandez said,
6 "Yes."

7 And at the end of the interview, the agent said, "You
8 confirmed that you didn't have a lawyer. You were thinking of
9 calling a lawyer to consult, to look for a lawyer, but at this
10 time you do not have a lawyer," to which Hernandez responded,
11 "I do not."

12 Now, the defendant asserts that the post-arrest
13 interviews should be suppressed because they were taken in
14 violation of Rule of professional conduct 4.2(a), the
15 no-contact rule, and the Fifth and Sixth Amendment. They argue
16 that an attorney, Manuel Retureta, during the post-arrest
17 interview, and -- that Hernandez had an attorney during the
18 interview and that the DEA agents knew that he had a lawyer
19 based on the earlier proffer session that was October 2016 or
20 so. And defendants assert that the statements should be
21 suppressed.

22 Let me begin by addressing *United States v. Hammad*, a
23 1988 decision written by Circuit Judge Irving Kaufman. It was
24 a decision that applied the Model Code of Professional
25 Responsibility. And the court said that a court could suppress

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1 a statement for a violation of this provision of the model
2 code, but went on to say, We have confidence that district
3 courts will exercise their discretion cautiously and with clear
4 cognizance that suppression imposes a barrier between the
5 finder of fact and the discovery of truth. That's from *Hammad*.
6 Exclusion is not required in every case. And it's also been
7 said that suppression of evidence is an extreme remedy that may
8 impede legitimate investigatory activities.

9 Well, much has happened since 1988. The ABA no longer
10 follows the model code. They have adopted the Model Rules of
11 Professional Responsibility. The Model Rules of Professional
12 Responsibility are in place and in force in the following
13 number of jurisdictions, in their entirety: Zero. There's no
14 state that has wholesale adopted them. New York adopted the
15 model rules in 2009. And this court adopted them as a basis
16 for professional discipline in Local Civil Rule 1.5(b)(5),
17 quote, absent significant federal interests.

18 But there is an important point to be made under the
19 rule as it is in existence in New York today. Rule 4.2(a)
20 provides, "In representing a client, a lawyer shall not
21 communicate or cause another to communicate about the subject
22 of the representation with a party the lawyer knows to be
23 represented by another lawyer in the matter unless the lawyer
24 has the prior consent of the other lawyer or is authorized to
25 do so by law." Well, one might read that and say, well, that

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1 means something like "knew" or "should have known" or "had a
2 reasonable cause to believe," that's what "know" means. But
3 that question is resolved in Rule 1.0(k) of the Rules of
4 Professional Conduct, which I will read. "'Knowingly,'
5 'known,' 'know,' or 'knows' denotes actual knowledge of the
6 fact in question. A person's knowledge may be inferred from
7 circumstances." So it's quite intentional that it uses the
8 word "know." In fact, in the definitions, under definition
9 1.0(r), there is a provision for "reasonable belief," or
10 "reasonably believes," and, when used in reference to a lawyer,
11 denotes that the lawyer believes the matter in question and
12 that the circumstances are such that the belief is reasonable.
13 It also provides in 1.5 that "'reasonably should know,' when
14 used in reference to a lawyer, denotes that a lawyer of
15 reasonable prudence and competence would ascertain the matter
16 in question." But 4.2(a) does not speak of "reasonable belief"
17 or "reasonably should know." It speaks of "knowing." And that
18 denotes actual knowledge of the fact in question.

19 Now, this is not gamesmanship here on the part of the
20 assistant United States attorneys. I accept as the record here
21 that they knew, in the sense of 1.0(k), 23 months before, that
22 Retureta represented Hernandez. It was somewhat more
23 ambiguous, but I accept for these purposes that they knew a
24 year and a half before, although that is disputed by the
25 government in terms of their actual knowledge; it could be a

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1 lawyer fishing around. But the government acted with caution,
2 based on the representations made by the government here in
3 open court, and therefore I conclude there was no violation of
4 4.2(a) on the record.

5 Now, in *Edwards v. Arizona*, the Supreme Court said,
6 "When an accused has invoked his right to have counsel present
7 during a custodial interrogation, a valid waiver of that right
8 cannot be established by showing only that he responded to
9 further police-initiated custodial interrogation, even if he
10 has been advised of his rights. An accused having expressed
11 his desire to deal with the police only through counsel is not
12 subject to further interrogation by the authorities until
13 counsel has been made available to him unless the accused
14 himself initiates further communication, exchanges, or
15 conversations with the police." That's *Edwards* at 451 U.S.
16 484-485. And, here, I do not see an express unambiguous
17 invocation of the right to counsel. Here there was a knowing,
18 voluntary, and intelligent waiver of *Miranda*. There was no
19 unambiguous invocation in a *Miranda* sense. And even at that,
20 the defendant indicated that he wanted to speak with the
21 agents. You will recall that, based on the red light from the
22 assistant United States attorneys, he was told that he was
23 going to be processed and taken to jail without an interview,
24 and, without being asked a question, he stated, quote, that he
25 wanted to speak with agents at this moment and start

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1 cooperating.

2 So I find there is no basis to suppress under the
3 no-contact rule. I find there is no basis to suppress under
4 *Miranda*. And with regard to the Sixth Amendment, the Sixth
5 Amendment right to counsel, which does attach at critical
6 stages of the criminal proceeding, which includes post-
7 indictment interrogations, may be waived. The Sixth Amendment
8 right to counsel may be waived by a defendant, so long as the
9 relinquishment of the right is voluntary, knowing, and
10 intelligent. And the defendant may waive the right whether or
11 not he is already represented by counsel. The decision to
12 waive need not be itself counseled. And that's the *Montejo*
13 case, *Montejo v. Louisiana*, 566 U.S. 778 (2009).

14 *Montejo* also says that when a defendant is read its
15 *Miranda* rights, which include the right to have counsel present
16 during interrogation, and agrees to waive those rights, that
17 typically -- and those are rights that have their source in the
18 Fifth Amendment, as a general matter -- an accused who is
19 admonished with these warnings under *Miranda* has been
20 sufficiently apprised of the nature of his Sixth Amendment
21 rights and of the consequence of abandoning those rights, that
22 his waiver on that basis will be considered a knowing and
23 intelligent one.

24 So the Court concludes on this record that there is no
25 basis to suppress the statements of November 23, 2018 under

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1 Rule 4.2(a), which for the purpose of this discussion I assume
2 applies here, the Fifth Amendment to the Constitution, or the
3 Sixth Amendment to the Constitution.

4 Let me inquire of the government, have I set a
5 schedule on 3500 material, on 404(b) evidence, on further
6 proceedings in this case?

7 MR. BOVE: Yes, your Honor.

8 THE COURT: All right. Is there anything further from
9 the government?

10 MR. BOVE: No, your Honor. Thank you.

11 THE COURT: Anything further from the defendant?

12 MR. MALONE: Judge, I just want to flag one issue, and
13 it may be in accordance with the schedule previously set by the
14 Court. The government, two days ago maybe, before we came up
15 to New York, provided defense counsel with some expert
16 disclosures, as well as some additional evidence of ledgers or
17 related material, not addressing the ledgers part -- I can deal
18 with that -- the expert part, which, the government purports to
19 introduce an expert regarding drug trafficking routes, which we
20 would have an objection to. They want to introduce testimony
21 of an expert as relates to what's referred to as, quote,
22 Honduras and Honduras policies. I'm not trying to argue that
23 motion or that issue today. I haven't seen any of the relative
24 background on that. I wanted to flag the issue so that we
25 address it at the appropriate time before trial and it doesn't

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1 interfere with our schedule.

2 THE COURT: Thank you. There is a schedule for
3 defendant's motions in limine. So you're welcome to make the
4 motion at that time.

5 MR. MALONE: OK. Thank you, Judge.

6 THE COURT: All right.

7 MR. MALONE: Nothing else from the defense, your
8 Honor.

9 THE COURT: OK. I want to commend all the
10 participants in today's hearing for the very thoughtful and
11 clear presentations in the written briefing and also in the
12 presentations today. It's a pleasure to have good attorneys
13 making the arguments and presenting the issues. So thank you
14 all.

15 MR. MALONE: Thank you, Judge.

16 MR. TEIN: Thank you.

17 (Adjourned)